No. 76-662

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM JOSEPH MCMURTREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 537 F. 2d 1387.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1976. A petition for rehearing with a suggestion of rehearing *en banc* was denied on October 12, 1976 (Pet. App. B). On November 11, 1976, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner had standing to suppress the marijuana introduced against him at trial.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of Florida, petitioner and three others were convicted of knowing importation of marijuana, in violation of 21 U.S.C. 952(a) and 960(a)(1), and of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to concurrent terms of four years' imprisonment and to two years' special parole. The court of appeals affirmed (Pet. App. A).

Prior to trial, petitioner moved to suppress as evidence nearly 6,000 pounds of marijuana discovered on a boat docked behind a co-defendant's house. The relevant facts, as developed at the suppression hearing, are as follows:

On May 13, 1974, Special Agent Raymond G. Magno of the Drug Enforcement Administration ("DEA") was informed by a private citizen that Charles Dale had purchased an expensive house in Lake Park, Florida, and that he had been primarily interested in the house's docking facility, which was capable of accommodating a large boat (Tr. 150, 197). On May 23, Agent Magno was told that a 43 foot boat had docked at the residence for one day and had departed (Tr. 151), and that several young men who had been at the house had left at the time of the vessel's departure (Tr. 152). When Magno drove past the house two days later, it appeared to have been abandoned, although a green Cadillac with Missouri license plates was parked in the driveway (Tr. 151-152).

After the boat had been gone for seven days, Magno began surveillance of the residence and requested assistance from the Customs Service and the County Sheriff's Office (Tr. 152, 199). On June 1, 1974, Magno saw a mobile home parked at the residence, which increased his

suspicion, since he knew from past experience that such vehicles are often used to transport smuggled contraband (Tr. 154, 198).

At approximately five o'clock in the afternoon of June 7, 1974,[1] a vessel fitting the description of the one that had earlier been seen at the residence was spotted by Customs agents at one of the mouths of the Intracoastal Waterway (Tr. 10, 41). The vessel was followed for about one hour, until it docked at Dale's residence (Tr. 11-13).

Shortly before seven o'clock that evening, a group of agents gathered at an intersection near the house to plan their future course of action. The Cadillac that had previously been sighted at the residence passed; its occupants observed the agents and the car then appeared to accelerate in the direction of the house (Tr. 154-156). Fearing that they had been spotted and that the premises would soon be vacated, Magno and the agents went directly to the house (Tr. 157-158, 201-202).

Upon Magno's arrival, an unidentified individual opened the front door of the house. Magno called, "Hold it. Federal agent," whereupon the person slammed the door shut (Tr. 202-203). Magno went around one side of the house and three other agents went around the other. The Sheriff's deputies and other federal officers remained in front (Tr. 14, 82-83, 203).

At the rear patio Customs Agent Gilbert Payette approached co-defendant Dale, who was standing on the porch, and asked for the captain of the vessel. Dale pointed to Hailstone, who was visible inside the house (Tr. 17, 78-80, 84). Agent Payette went in through the sliding doors

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[1]The date given in the opinion of the court of appeals — July 7, 1974 (Pet. App. 5) — was apparently an oversight.

that were already open and, after identifying himself to Hailstone, inquired whether the latter was the vessel's captain and whether he had just come from a foreign port (Tr. 17-18, 91-92). Hailstone responded affirmatively to both questions and acknowledged that he had not cleared customs. Payette then said that the vessel was under constructive seizure. Payette and Hailstone then went to the boat for a document inspection (Tr. 18-20, 142).

Magno also went inside the house through the open door. He announced that the boat was about to be examined by Customs and requested that everyone remain on the premises (Tr. 162). Payette found nearly 6,000 pounds of marijuana on the boat and arrested Hailstone (Tr. 20-21). Dale and four other individuals in the house were also arrested (Tr. 163-164, 171-172).

Subsequent to the discovery of the marijuana, the house was cursorily searched (Tr. 170-171). Shortly thereafter Hailstone shot and killed himself with a rifle (Tr. 188), and a more thorough search was made. At approximately ten o'clock, before leaving the house for the night, the agents searched a third time; petitioner was found hiding in a utility room attached to the garage (Tr. 121-124, 319).

ARGUMENT

Petitioner claims that the agents' initial entry into the house was illegal; that Hailstone's statements that the vessel had just come from a foreign port but had not cleared customs was the product of that illegality; that the subsequent search of the vessel and discovery of the marijuana were in turn the result of Hailstone's statements; and that he, petitioner, has standing to complain of the entire chain of events as violative of his Fourth

Amendment rights. Petitioner further claims that the court of appeals, in holding that the information obtained from Hailstone was not the product of an illegal search or of any violation of petitioner's rights, has rendered a decision that conflicts with *United States* v. *Guana-Sanchez*, 484 F. 2d 590 (C.A. 7), writ of certiorari dismissed as improvidently granted, 420 U.S. 513, and *United States* v. *Mallides*, 473 F. 2d 859 (C.A. 9).

To begin with, there is no conflict. In *Mallides* the court held that the initial stop of the defendant's car had been unlawful, tainting the discovery that his passengers were aliens who had entered the country illegally (and their testimony at trial). *Guana-Sanchez* involved the suppression for use at trial of "live witness testimony" that was arguably the fruit of an unlawful arrest;[2] it did not address the question whether and under what circumstances one individual is entitled to suppression of inculpatory evidence discovered as a result of a voluntary remark made by another individual to police officers who have illegally entered a building.

Since Hailstone was visible to Agent Payette before he entered the building, and the ensuing conversation between them involved no search of the premises, we believe the court of appeals' holding was correct. There is, however, no occasion for this Court to reach that issue in the present case, for petitioner failed to make a showing sufficient to have given him standing to complain of any conduct of the government officers—even the seizure of

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[2]The question whether the exclusionary rule requires the suppression of the trial testimony of a witness whose identity or whose possession of relevant information was learned as the result of an illegal search is presented in our petition in *United States* v. *Ceccolini*, No. 76-1151, now pending before the Court.

tangible evidence. Petitioner did not testify or otherwise present evidence on his behalf at the hearing on his motion to suppress. The evidence relating to him came from the testimony of several government agents that he was discovered, some three hours after the agents first entered the house, hiding in a utility room accessible via a door from the garage (Tr. 107, 268, 297, 319).

So far as the evidence shows, then, petitioner might have been in the utility room continuously from the moment the agents first approached the house and indeed might never have been in any other part of the house. Petitioner did not show that he had ever been to the house before; did not explain his relationship with the other people in the house; and did not even establish that he was in the house with the consent of the owner, Dale. Cf. *Jones* v. *United States*, 362 U.S. 257.

In these circumstances we submit that petitioner has not demonstrated that any reasonable expectation of privacy on his part was violated when Customs Agent Payette walked into the living room and asked Hailstone whether he was the captain of the vessel that had just been docked. See *Wong Sun* v. *United States*, 371 U.S. 471, 491-492. Since petitioner failed *in limine* to establish standing to object to the agent's entry into the house, it is unnecessary for this Court to consider whether the court of appeals was correct in ruling that petitioner lacked standing to object because of the nature of the evidence obtained (*i.e.*, voluntary statements) following the unlawful entry into the house.[3]

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[3]We recognize that, under the automatic standing rule of *Jones* v. *United States*, *supra*, petitioner would have standing in regard to the charge that he possessed the marijuana, in violation of 21 U.S.C. 841(a). In our view the automatic standing rule is without purpose after *Simmons* v. *United States*, 390 U.S. 377, and should accordingly be abandoned. Its continuing vitality was questioned but not decided by this Court in *Brown* v. *United States*, 411 U.S. 223, 228. The issue is an important one on which there exists a conflict among the circuits. Compare, *e.g.*, *United States* v. *Hunter*, C.A. 6, No. 76-1631, decided March 4, 1977, with *United States* v. *Boston*, 510 F. 2d 35 (C.A. 9), certiorari denied, 421 U.S. 990. There is no occasion to reach that issue in this case, however, since petitioner's four-year sentence on the possession count was made to run concurrently with his four-year sentence on the importation count (as to which the automatic standing rule by its own terms does not apply).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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